THE LAW SCHOOL.

LECTURE NOTES.

EVIDENCE — ADMISSIBILITY OF DECLARATIONS OF TESTATOR TO PROVE CONTENTS OF LOST WILL. — (*From Prof. Thayer's Lectures.*) — Stephen's proposition in his Digest is this: "The declarations of a deceased testator as to his testamentary intentions and as to the contents of his will are deemed to be relevant, when his will has been lost and when there is a question as to what were its contents. . . . In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.[1] This is very questionable.

The case cited to support the proposition is *Sugden* v. *Lord St. Leonards*.[2] In this case the will had disappeared, and its contents were proved by the direct testimony of one witness who was well acquainted with them. That was the main evidence in the case. The judges repeatedly declared, that it did not need corroboration, but that it was satisfactory to find corroboration, and for that secondary purpose declarations of the testator made both before and after the making of the will were admitted. On appeal the admission of this evidence was sustained.

This is all that the case decided, but it is remarkable for many ill-considered *dicta* as to the hearsay exceptions, and as to the rules of evidence in general. See especially the opinions of Jessel, James, and Cockburn. Mellish, L. J., states the sounder doctrine, and his decision is consistent with the authorities.

The doctrine put forward by some of the judges that if evidence is admitted for one purpose, it may be used for any other, is not to be accepted; and the remarks of the Master of the Rolls as to the hearsay rule are peculiarly loose and inaccurate.

Sugden v. *St. Leonards* is cited with approval in a late Massachusetts case.[3] But in *Woodward* v. *Goulstone*,[4] in the House of Lords in 1886, the gravest doubt is thrown on the main propositions of the case, and the view taken by Mellish, L. J., is favored.

In the case of *Quick* v. *Quick*,[5] which *Sugden* v. *St. Leonards* disapproves, declarations of the testator, made after the execution of the will, were offered, not as corroborative proof, but as the only evidence of the contents of the will, and it was held that they were not admissible. The questions raised in the two cases were not necessarily the same.

LEASE — TENANT'S RELIEF IN EQUITY FOR BREACH OF CONDITION. — (*From Prof. Gray's Lectures.*) — When the landlord has expressly sanctioned the breach of condition, or knowing of it has waived performance by accepting rent, he is not allowed, even at law, to turn the tenant out.

In certain cases equity will afford protection where courts of law will not.

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[1] Art. 29.
[2] L. R. 1 P. D. 154.
[3] *Pickens* v. *Davis*, 134 Mass. 252.
[4] L. R. 11 App. C. 469.
[5] 3 Sw. & Tr. 442.

If, for instance, there has been delay in the payment of rent or taxes, and the tenant pays in full with interest or tenders payment after the ejectment suit is brought, equity will protect him against the landlord. (*Giles* v. *Austin*, 62 N. Y. 486). On the other hand, it has been decided that for breach of covenant to keep the premises insured equity can afford no relief. (*Green* v. *Bridges*, 4 Sim. 96).[1] Where the covenant is to repair, the law is not very well settled. In *Bracebridge* v. *Buckley*, 2 Price, 200, it was held (with a dissenting opinion) that under the circumstances of that case equity could not interfere.

The principle underlying these decisions seems to be, not that a breach has occurred and the landlord has not been injured, nor that damages have been given, but that the contract has in fact never been broken. In other words, where the parties can be restored to the position they held at the time of the breach, equity will eliminate the element of time. Now, in case of a covenant to keep the premises insured, it is plain that equity cannot relieve. Nothing can put the parties in the position they occupied before the breach. The risk has been incurred, and no subsequent insurance could guard against a prior risk. This is equally true when the lessee having covenanted to insure the premises in the lessor's name insures them in his own, — even when this occurs through no fault of the lessee, but by the unauthorized act of his agent. (*Green* v. *Bridges*, *supra.*)

The covenant to repair stands on a peculiar footing. It is evident, on the one hand, that in every case all possible claims could not be satisfied by a distinct payment of money, and yet, very often, if the premises are repaired they are put in exactly the same condition, or even better condition, than if the repairs had been made at the proper time. The general rule of equity does not seem, however, to allow relief in this case. The covenant was for the doing of a certain thing; that thing has not been done, and equity cannot superintend the performance of it. Where the breach of condition consists in the non-payment of money the parties can, by the very decree of the court, be put in the same position as at the time of the breach.

So where the making of a settlement was a condition annexed to a legacy, and the settlement was not made within the specified time, although through no fault of the legatee, it was held that equity could not interfere. (*In re Hodges' Legacy*, L. R. 16 Eq. 92.)

There exists a special ground for the interference of equity whenever the tenant has been led by the acts of his landlord to believe that a condition would not be strictly enforced. When the tenant has been accustomed to pay his rent on the tenth of the month, though due on the first, the landlord cannot, without warning, demand the rent on the first, and turn the tenant out for not complying. This is called the relief of Equity against *surprises*.

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[1] But see *contra*, *Mactier* v. *Osborne*, 15 N. E. Rep. 641 (Mass.).